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No. 1157

IN THE

Supreme Court of the United States

MISSOURI PACIFIC RAILROAD COMPANY,

Petitioner,

v.

SOUTHERN PACIFIC COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF CIVIL APPEALS FOR THE
FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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No. .....

In The

Supreme Court of the United States

Missouri Pacific Railroad Company,

Petitioner,

v.

Southern Pacific Company,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas

Petitioner, Missouri Pacific Railroad Company, respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas entered in this cause on June 19, 1968.

OPINION BELOW

The opinion of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas filed June 19, 1968, is reported in 430 S.W. 2d 900 and is printed *infra* as Appendix B.

JURISDICTION

The judgment of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas was entered on June 19, 1968 (Appendix C). The Supreme Court of Texas "refused as presenting no error requiring reversal" Petitioner's Application for Writ of Error on November 20, 1968, and overruled Petitioner's Motion for Rehearing on January 22, 1969, making final the decision of the Court of Civil Appeals (Appendix E).

The jurisdiction of this Honorable Court is invoked under 28 USC § 1257(3). The federal question presented by this Petition was the identical question and the sole question presented to the Supreme Court of Texas (Appendix D).

QUESTION PRESENTED

A railroad company's liability to its employee for personal injury is "absolute" because of such railroad company's violation of the Safety Appliance Act in using a freight car with a defective hand brake. Such railroad company settles with its injured employee. Is such railroad company entitled to be fully reimbursed in an action for indemnity against another railroad company which negligently furnished the freight car with the defective hand brake, notwithstanding that as between the two railroad companies only the one seeking indemnity was guilty of the violation of the Safety Appliance Act which gave rise to the claim?

STATUTE INVOLVED

The statute involved is what is commonly known as the Safety Appliance Act of 1910, 32 Stat. 298, 45 USC § 11-16, and specifically that portion of the Act (§ 11) which makes

it "unlawful" for any common carrier to use on its line a freight car not equipped with "efficient" hand brakes.

The above statute, to the extent relevant, is set forth as Appendix A.

STATEMENT OF THE CASE

One Liles, a brakeman in the employ of Respondent, Southern Pacific Company, received personal injuries while engaged in switching railroad cars. One car (MP4626) was owned by Petitioner, Missouri Pacific Railroad Company. The freight car MP4626 was equipped with a hand brake which was defective. Liles was injured because he could not properly stop the freight car with the hand brake. Earlier in the day, prior to Liles' injury, the freight car MP4626 with the defective hand brake had been left on an interchange track by Petitioner to be transferred to, and accepted and picked up by Respondent in accordance with the established Interchange Rules (Tr. 47-48) and customary practice in the interchange[1] and transfer of freight cars between common carriers. Respondent had accepted the freight car and was using it on its line in making up a freight train when the accident occurred. Although acknowledging that the brake was defective, and, therefore that its use of the car constituted a violation of the Safety Appliance Act, Respondent negotiated with its injured employee for over two years before finally settling with him. Prior to such settlement Respondent made demand on Petitioner to settle with the injured employee and Petitioner declined to do so because of Respondent's admitted viola-

[1] "The boundary between carriers is the place where the train is received in interchange under 49 C.F.R. 132.12 because at that point the use or haul on the line of one carrier ceases and the use or haul on the line of the other carrier commences." ICC Rules and Regulations under 49 C.F.R. 132.12 as quoted in *U. S.* v. *Akron, Canton & Youngstown RR Co.*, 397 F. 2d 139 (6th Cir. — 1968).

tion of the Safety Appliance Act, (among other reasons). After finally settling with its employee, Respondent filed this suit against Petitioner seeking full indemnity and reimbursement for the amount paid its employee in settlement. After trial before the Court without a jury, Respondent obtained judgment against Petitioner for full indemnity on the basis of the trial court's findings that Petitioner was negligent in failing to properly inspect and correct the hand brake defect while the car was in its possession. Although the trial court found Respondent not guilty of common law negligence,[2] it found that Respondent violated Section 11 of the Safety Appliance Act in using the car with a defective hand brake.

Petitioner appealed from the adverse judgment on the ground, among others, that Respondent's violation of the Safety Appliance Act precluded it from shifting its responsibility to and obtaining full indemnity from Petitioner for the amount paid Respondent's employee in settlement of his claim against Respondent under the Safety Appliance Act.

REASONS FOR GRANTING THE WRIT

1. The decision of the Texas court concerns an extremely important federal question[3] not heretofore deter-

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[2] Although exonerating Respondent of common law negligence the Court found that in addition to violating the Safety Appliance Act: "Any inspection made by T&NO's [Respondent] employees at Sinton, Texas, of the hand brake on the hopper car MP4626 was not an inspection of such character or *care* as to disclose existence of a defect then existing in the hand brake (Emphasis added) (Tr. 52).

[3] Commenting on the Federal Employers' Liability Act it was said in *Arnold* v. *Panhandle & S.F. R. Co.*, 353 U.S. 360 1 L.ed. 2d 889 at 891, 77 S. Ct. 840: 'The petitioner having asserted federal rights, it is our duty under the Act to make certain that they are fully protected, *as the Congress intended them to be.*" (Emphasis added)

mined by this Court, involving the construction and effectiveness of the Safety Appliance Act, and as such bears on the safe handling of railroad cars interchanged between common carriers and the prevention of injuries to employees and the public.

2. The decision of the Texas court reaches an erroneous result; is contrary to well settled principles of indemnity and public policy as enunciated by the Supreme Court of the United States and other courts; would seriously impair the congressional intent to impose "absolute liability" on only the railroad *using* a freight car with a safety appliance defect; would encourage litigation between railroad companies in an effort to shift responsibility to injured employees under the Safety Appliance Act and would impede and complicate the settlement of valid personal injury claims of railroad employees.

Importance of Question and Errors In Decision of State Courts

Section 11 of the Safety Appliance Act, (27 Stat. 531, as amended 32 Stat. 298, 45 USC § 11) in relevant part, provides that it shall be "unlawful" for any common carrier subject to the Act "to haul, permit to be hauled or used in its line" any car not equipped with "efficient hand brake". This is a penal as well as a remedial statute.[4] Even more important, it is essentially a safety measure as this Court and other courts have specifically stated.[5]

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[4] In 1957 the penalty was increased from $100.00 to $250.00 "for each and every such violation." (71 Stat. 352, 45 USC §13).

[5] "History showed that hundreds of workers had been injured or killed by the stopping of unbraked cars, by the operation of hand brakes, and by the use of hand couplers. This history well known to Congress, was the primary purpose behind the legisla-

Respondent's violation of the Safety Appliance Act rendered it "absolutely liable" to its injured employee without regard to Respondent's care or negligence and without regard to any negligence on the part of the employee. The duty imposed by the statute is "absolute", "unqualified" and "unconditional", and the carrier "using" such a defective freight car is not excused by any showing of care, however assiduous. *Myers* v. *Reading Co.*, 331 US 477, 482, 67 S. Ct. 1334, 91 L. ed. 1615; *Brady* v. *Terminal R. Asso.*, 303 US 10, 15, 58 S. Ct. 426, 82 L. ed. 614; *O'Donnell* v. *Elgin, J. & E. Ry. Co.*, 338 US 384, 70 S. Ct. 200, 94 L. ed. 187, 16 ALR 2d 646.

In permitting indemnity in this case, the Texas court completely ignores the congressional intent behind the Safety Appliance Act. Indeed, for all practical purposes, it completely ignores the Safety Appliance Act. It treats the case in terms of an ordinary common law indemnity action between joint tort feasors — speaking in terms of alleged breaches of duty as between joint tort feasors and citing Texas cases[6] having nothing to do with railroads or the

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tion. The Act, therefore, should be liberally construed as a safety measure."

U.S. v. *Seaboard Air Line Railroad Co.*, 361 U.S. 78, 4 L.ed. 2d 25, 80 S. Ct. 12

"Our view is that the obvious purpose of the Safety Appliance Act is to induce carriers to adhere to higher standards of safety in their operations by imposing a liability on interstate carriers if they do not comply with the Act. . . ."

Clark v. *Atlantic Coast Line Railroad Co.*, 244 F. 2d 368 (D. C. Cir., 1957)

"Congress . . . for its own reasons imposed extraordinary safety obligations upon railroads. . . ."

Kernan v. *Am. Dredging Co.*, 355 U.S. 426, 2 L.ed. 2d 382 at 390, 78 S.Ct. 394

[6] This case involving the construction and effect of a Federal Statute the Court need not be concerned with trying to fit the case into one of the many, confusing "indemnity semantic cubicles." Prossor *On Torts* — 3d ed. p. 278.

Safety Appliance Act. This led the Court to an erroneous result. It has been made abundantly clear that a railroad's liability for violation of the Safety Appliance Act is an independent "actionable wrong" (*O'Donnell* v. *Elgin J. & E. Ry. Co.*, 338 US 384, 70 S. Ct. 200, 94 L. ed. 187, 16 ALR 2d 646); that such liability is not imposed on a carrier for the acts of other carriers, but because of its own wrongful and "unlawful" conduct in the "use" of a car with a safety appliance defect; that it is not the mere "possession" of a car with a penalty defect which results in the liability, but it is the carrier's use of such car on its own line, *U. S.* v. *Western, etc. RR. Co.*, 297 F. 482 (D.C., Ga., 1924).[7]

It is both the right and duty of a carrier to refuse to accept a defective car at interchange if acceptance would necessarily involve its use of such car in violation of the Safety Appliance Act. *Baltimore & O.S.W. R. Co.* v. *United States*, 242 F. 420, 425 (6th Cir. — 1917); *United States* v. *Akron, Canton & Youngstown RR Co.*, 397 F. 2d 139 (6th Cir. — 1968). As stated in *United States* v. *Southern Pacific Co.*, 167 F. 699 (D.C., Cal.):

> "A company is under no obligation to receive cars defective as to safety appliances from any other railroad, and when it does so, *it must know at its peril* that each car so received is equipped with the lawful safety appliances . . . It is the use of a car in a

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[7] The Court in the cited case in considering the constitutionality of an act which would impose a penalty for the acts of others over whom it had no control said:

> "The answer avers that the statute, thus originally construed, takes the carrier's property without due process of law, in that a penalty is imposed for the acts of others over whom it had no control, . . . Had the penalty been inflicted for the possession of the defective car . . . there would be force in the contention; but the penalty is laid only on a use of the car, and that may be avoided. The very agents of the carrier who use it may, by diligence, inspect it, and are under duty to lay it aside if it be defective."

defective condition that the law seeks to prevent . . ." (Italics added).

It is significant that as between the two railroads — Petitioner and Respondent — *only* Respondent was guilty of a violation of the Safety Appliance Act. (Even assuming Petitioner was responsible for the brake defect in the first place.) The law is settled that the *entire responsibility* for a freight car with respect to a Safety Appliance Act defect rests with the railroad which is *using* the car, irrespective of ownership of the car and irrespective of the condition of the car at the time it was delivered to the carrier using it with such defect. After Respondent accepted Petitioner's freight car on the interchange track, under the terms of the Safety Appliance Act it became solely and fully responsible for any brake defect, and Petitioner was forthwith relieved of any liability it might have under the Act. *Clark* v. *Atlantic Coast Line,* 244 F. 2d 368 (D.C. Cir. — 1957); *Patton* v. *Baltimore & Ohio R. Co.,* 197 F. 2d 732 (3rd Cir. — 1952). The reason for this is obvious. The policy of the law here in imposing absolute liability on the carrier using the car with the defect is to encourage that carrier to be certain by inspection, and repair, if necessary, that the car is not used with a defective hand brake.[8] This sound and obvious policy of the law would be completely circumvented if the *only* carrier guilty of violating the Safety Appliance Act, and liable to its injured employee as a consequence thereof, was permitted to shift the entire loss to, and be

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[8] "Treating each carrier which handles a train movement independently, and compelling it to inspect for itself rather than rely on an inspection by a previous carirer is a reasonable means of promoting safety, and appears to be intended by the regulations."

United States v. *Terminal RR Assn. of St. Louis,* 397 F. 2d 467, 470, (7th Cir., 1968) cert. den'd. Dec. 9, 1968, 89 S. Ct. 447

completely reimbursed by another carrier which may have been guilty only of ordinary, common law, negligence. The clear intent of Congress to *limit* this liability to the carrier *using* the defective car would be thwarted if by circumvention, in an indemnity action, this liability is shifted to a carrier not using the defective car.

Indeed, it has been held that a carrier subject to the Safety Appliance Act may not even by contract relieve itself of its statutory liability under the Safety Appliance Act. *United States* v. *Houston Belt & Terminal Ry. Co.*, 210 F. 2d 421, 424 (5th Cir. — 1954); *Clark* v. *Atlantic Coast Line RR Co.*, 244 F. 2d 368, 372 (D.C. Cir. — 1957).

In *Chicago & N.W. Ry. Co.* v. *Davenport*, 205 F. 2d 589 (5th Cir. — 1953 Cert. Denied, 346 U.S. 873, 74 S.ct 123 98 L. ed 382) the Court even held that a written contract for indemnity would be invalid as contrary to the spirit and prohibitions of the law and not enforceable so as to permit a railroad company liable to an employee for a Safety Appliance Act violation, to be indemnified.

In cases decided before the Safety Appliance Act of 1910 the Supreme Court of the United States and the Supreme Court of Texas both held that as between two railroad companies, both of whom were guilty of common law negligence in failing to properly inspect or repair freight cars, there could be no indemnity. *Union Stock Yards Company* v. *Chicago, Burlington & Quincey Railroad Co.*, 196 U.S. 217, 25 S. Ct. 226, 49 L.ed. 453 (1905); *Galveston H. & S.A. Ry. Co.* v. *Nass*, 59 S.W. 870 (Tex.-1900). This has also been the holding of the courts since the enactment of the Safety Appliance Act. *Chicago R.I. & P.R. Co.*, v. *Chicago & Northwestern Ry. Co.*, 280 F. 2d 110 (8th Cir. — 1960) cert. denied, 81 S. Ct. 378, 364 U.S. 931, 5 L.ed. 2d 364.

A carrier guilty of the more serious offense of violating the Safety Appliance Act and thus being guilty of "unlaw-

ful", penal conduct, and negligence *per se*,[9] should not be in a more favorable position.

This was precisely the reasoning of the Court in *Lowe* v. *New York Central Ry.*, 148 F. Supp. 337 (E. D. Mich.-1957), a case directly in conflict with the holding of the Texas court in the instant case. In that case indemnity was denied to a railroad company liable because of its violation of the Safety Appliance Act. That court properly noted that "the violation of the Federal Safety Appliance Act — considered to be negligence *per se* — is certainly not a less blameworthy act than failure to use ordinary care."

See also, to the same effect, *Cush* v. *Pittsburgh Chartiers & Youghiogheny Ry. Co.*, 157 F. Supp. 360 (W.D. Penn. — 1957).

Irrespective of whether the carrier seeking indemnity is liable because of common law negligence or negligence *per se* by legislative fiat, the policy considerations are identical in both instances:

> "The very foundation and principle of public policy that denies recovedy in such cases [is that] . . . because, if that were allowed, the negligent party would be offered an inducement to relax its vigilance in the protection of those who are largely dependent upon it for their safety in the performance of hazardous duty."
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> *Galveston, H. & S.A. Ry. Co.* v. *Nass*, 59 S.W. 870 (Tex. — 1900)

To the same effect are those cases holding that violation of a state safety statute precludes the violator from ob-

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[9] ". . . it clearly is the legislative intent to treat a violation of the Safety Appliance Act as 'negligence' — what is sometimes called 'negligence *per se*'." *Urie* v. *Thompson*, 337 U.S. 163, 189, 69 S. Ct. 1018, 93 L.ed. 1282 (1949). *Accord: San Antonio Ry.* v. *Wagner*, 241 U.S. 476, 484, 36 S. Ct. 626, 60 L.ed. 1110 (1916), *Tex. & P. R. Co.* v. *Sherer*, 183 S.W. 404 (Tex. Civ. App. — 1916, error ref'd.)

taining indemnity. This has been the reasoning of the New York Courts under comparable facts:

> "To hold otherwise would encourage disregard for the objectives of the statute. The objectives of the statute are not alone to provide remedies for laborers but more particularly to prevent accidents causing the injuries. The sanctions imposed by the statute and by the cases are necessary to compel a higher standard of care by forbidding any delegation of responsibility and any other right of recovery even against a joint tort feasor."[10]

The holding of the Texas Court in the instant case not only defeats the basic purposes of the Safety Appliance Act but would result in protracted litigation between railroad companies seeking indemnity for the consequences of their own Safety Appliance Act violation. And even worse, such holding would result in endless delays in settling valid personal injury claims under the Safety Appliance Act. If this remains the law, why should a railroad company settle with its own injured employee, even though absolutely liable under the Safety Appliance Act, when it can implead another carrier in the event a lawsuit is filed — and perhaps escape scot-free? This must have been one of the major considerations by Congress when it provided by terms of the Safety Appliance Act that liability be imposed absolutely on the carrier *using* the defective car with the defect, and only on that carrier.

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[10] *Rufo* v. *Orlando*, 309 N.Y. 345, 130 N.E. 2d 887 (1955), denying indemnity to a contractor liable to an injured person because of violation of a New York safety act.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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